Filed 9/12/06 Gunnell v. Silas CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROSS GUNNELL, Cross-defendant and Appellant, v. MARTINA A. SILAS, Cross-complainant and Respondent.	B181649 (Los Angeles County Super. Ct. No. BC 287 340)

APPEAL from the judgment of the Superior Court of Los Angeles County. Morris B. Jones, Judge. Affirmed.

Scott, Arden & Salter and James Ellis Arden for Cross-defendant and Appellant.

Martina A. Silas, in pro. per.; Law Offices of Martina A. Silas and Frederick T. Jelin for Cross-complainant and Respondent.

Ross Gunnell appeals from a judgment obligating him to pay his former attorney, Martina Silas, the legal fees she earned and the costs she incurred while representing him in a personal injury action. We affirm.

FACTS AND PROCEEDINGS[1]

Respondent attorney Martina A. Silas represented appellant Ross Gunnell and three of his co-workers in their personal injury lawsuit against their former employer, Metrocolor Laboratories. Their lawsuit alleged Metrocolor had concealed from them the hazards of a solvent they used on the job. After a jury trial, appellant won a $6.5 million verdict. The trial court overturned the verdict, however, after it concluded that appellant's exclusive remedy for his injuries was the workers' compensation system. In a published decision, Division 3 of this district affirmed the trial court in *Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710. Silas represented appellant in that appeal.

Following his loss in Division 3, appellant sued Silas for legal malpractice in her handling of his lawsuit. In response, Silas cross-complained for the litigation costs she had paid on appellant's behalf in the underlying action, and for her professional fees for working on the appeal. The trial court granted summary judgment on appellant's malpractice claim and dismissed his complaint against Silas, a ruling we later affirmed in *Gunnell v. Silas* (Jan. 27, 2006, B180744), a nonpublished opinion. The court then tried without a jury Silas's cross-complaint to recover litigation costs and professional fees. After hearing all the evidence, the court entered a judgment of $481,810.51 for Silas. The award consisted of $250,000 for Silas's fees in the appeal to Division 3, plus $231,810.51 for the litigation costs she advanced to appellant in the

---

1 We base our procedural and factual summary on the appellate record, the decision of our colleagues in Division 3 in *Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, and our nonpublished decision in *Gunnell v. Silas, supra*, B180744.

underlying personal injury action. The court also awarded Silas $67,299.66 in prejudgment interest. This appeal followed.[2]

DISCUSSION

1. *Court Properly Barred "Informed Consent" Evidence*

Appellant contends Silas failed to get his informed written consent to jointly represent him and three co-workers in the underlying personal injury action. He asserts Silas needed his consent because the greater strength of his personal injury claim created a conflict of interest with his co-workers' relatively weaker claims. According to him, the court erred in refusing to let him argue his purported lack of consent defeated Silas's claim for her legal fees.

Appellant is mistaken in at least two ways. First, he cites no authority that differences in the relative strength of claims among multiple plaintiffs creates a conflict of interest. Thus his argument lacks legal support. (See *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 [contention deemed abandoned if not supported by legal authority].)

---

[2] This appeal is the second in this lawsuit between appellant and Silas. The first was from the summary judgment of the malpractice complaint. Because dismissal of the malpractice complaint did not dispose of all the issues between the parties, appellant violated the "one final judgment rule" by pursuing that first appeal. (See 9 Witkin, Cal. Procedure (4th ed. 1997), Appeal § 57, p. 113 et seq.; see particularly § 77.) We did not catch appellant's violation of this fundamental rule of appellate practice because the record in the first appeal did not contain the cross-complaint, and neither appellant's opening brief nor Silas's respondent's brief mentioned the cross-complaint in any way; indeed, appellant's opening brief misleadingly stated the appeal was from a final judgment, which was true only in a narrow sense stripping a final judgment of its proper meaning. Appellant's reply brief did mention in passing a cross-complaint, but its import did not dawn on us, possibly because appellant's representation that he was appealing from a final judgment obscured the cross-complaint's significance. If we had known the first appeal was not from one final judgment, we would not have heard it separately from this appeal. This procedural anomaly does not affect our decision on the issues raised on the present appeal.

Second, it lacks factual support. Appellant ignores that the trial court found when granting summary judgment for Silas no evidence she had violated any ethical canons. The trial court's order dismissing the malpractice complaint stated, "There is no triable issue of material fact as to any other allegation of malpractice. . . . [Gunnell] has not submitted any evidence to establish that . . . [Silas] failed to obtain [Gunnell's] informed consent under California Rules of Professional Conduct 3-310 and 4-100." Appellant offered nothing in his appeal from the summary judgment that showed the trial court's finding of no ethical violation was wrong. Indeed, in his appeal from the summary judgment, appellant did not even raise Silas's purported failure to get his informed consent; he based his appeal on other grounds, instead. We have since affirmed that summary judgment. That affirmance is res judicata for issues that were, or could have been, tried below. (*General Dynamics Corp. v. Workers' Comp. Appeals Bd.* (1999) 71 Cal.App.4th 624, 629.) Appellant thus cannot now challenge the court's finding of no ethical violations involving informed consent.

2. *Court Properly Awarded Silas Her Professional Fees for the Metrocolor Appeal*

Relying on provisions of the Business and Professions Code that entitle an attorney to a reasonable fee in the absence of a written fee agreement, the trial court awarded Silas $250,000 for handling the *Metrocolor* appeal. (Bus. & Prof. Code, §§ 6147 subd. (b), 6148, subd. (c).) Appellant contends the court erred in awarding Silas any fee because appellant did not win his lawsuit against Metrocolor. According to him, he and Silas had orally modified her contingency fee agreement to cover her work on the appeal. Under the modification, he claims Silas agreed to handle the appeal in return for raising her contingency fee to 50% of any recovery. As appellant recovered nothing, he concludes she was entitled to nothing, too.

The trial court did not, however, believe appellant's claim about extending the fee agreement to the appeal. The court stated, "I know [appellant] testified he never expected to have to pay because he thought the contingency fee agreement would continue [through the appeal]. That's one of the findings the court found was really

unbelievable from his testimony . . . ." The court instead implicitly accepted Silas's testimony that appellant agreed to pay her an hourly rate for her work on the appeal. The court's factual finding--and particularly its credibility determination--is binding on appeal.

Appellant also contends that even if the court rejected his testimony about the oral modification, the court erred a second time by finding the original contingency fee agreement did not apply to the appeal. We disagree. The contingency fee agreement stated it did not cover an appeal. It declared, "Legal services that are NOT provided by the Attorney under this Agreement include, but are not limited to, the handling of any . . . appeal from a court order or judgment." From this language, the trial court correctly concluded, "the original contingency fee contract terminated by its own terms at the conclusion of the proceedings in Superior Court."

Finally, appellant contends substantial evidence did not support the fee award. He asserts Silas improperly tried to collect from him fees for work she did for his co-plaintiffs by lumping her fees for all four of them together. He also criticizes what he describes as Silas's "block billing" in which some of her time entries on her billing sheets involved impossibly long hours for one day, such as 325 hours billed on December 1, 1999, and 103 hours on September 28, 2001.

Appellant's contention of insufficient evidence fails because he does not acknowledge evidence answering his suggestion of improper billing, nor does he discuss evidence supporting the fee amount. For example, he does not discuss Silas's explanation that a computer printing error generated the bills that appeared to attribute hundreds of hours of work to one day. He also does not discuss that Silas's usual hourly billing rate for appeals was $300, and that she testified she worked more than 1,000 hours on the *Metrocolor* appeal, making the court awarded fee of $250,000 reasonable on its face. Because appellant does not discuss the evidence supporting the fee amount, he waives his claim of insufficient evidence. (*Foreman & Clark Corp v. Fallon* (1971) 3 Cal.3d 875, 881; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.)

3. *Court Properly Awarded Costs from Metrocolor Litigation*

The court awarded Silas $231,810.51 for the litigation costs she advanced to appellant in the Metrocolor lawsuit. Appellant contends Silas was entitled to recover her costs from him only if he collected damages from Metrocolor. In support of his contention, he points to the phrase "in addition to" in a clause in the contingency fee agreement that discussed costs. That clause stated, "In addition to paying legal fees, [appellant] shall reimburse [Silas] for all costs and expenses incurred by [Silas], including, but not limited to, court filing fees, deposition costs and transcripts . . . ." Appellant interprets the phrase "in addition to" as meaning he owed costs only if he also owed fees, and because he recovered no damages from Metrocolor, he owed no fees, and thus by implication, no costs. He also cites in support of his contention the contingency agreement's provision taking costs off the top of any recovery before calculating the contingency fee from the remaining balance.[3] He reasons that such a provision meant Silas could recover her costs *only* from a money judgment.

The court found the fee agreement was to the contrary. We agree. Appellant misinterprets the fee agreement because he reads selected portions in isolation. Looking instead at the entire agreement reveals his misreading. (Civ. Code, § 1641 [must interpret contract as a whole, not individual parts in isolation].) First, the agreement stated Silas would advance costs, but appellant was responsible for repaying them. Under the clause "Advancement of Costs and Expenses-Retainer," the agreement provided that "[appellant] will receive a detailed periodic statement of [his] account showing the costs and expenses incurred. Payment of such costs and expenses is due and payable in full within twenty (20) days from the date of the billing

---

[3] The clause stated, "Costs and disbursements incurred . . . will affect the contingency fee and the Client's recovery. Costs and disbursements shall be first deducted from any recovery and paid to the party advancing such costs and disbursements. The agreed contingency rate shall then be computed . . . and the Attorney shall be paid such contingency fee. The balance shall then be paid to the Client."

statement." Of course, periodic billing and payments are inconsistent with reimbursement contingent on a judgment. The agreement also allowed Silas to withdraw from representing appellant if he did not pay the bills; it stated, Silas "has the option to . . . withdraw from the case" if appellant did not pay the bills. Such an option is also inconsistent with payment only upon judgment. And finally, the agreement obligated appellant to pay litigation costs even if Silas withdrew or he fired her: "Notwithstanding the withdrawal or discharge of [Silas], [appellant] will be obligated to reimburse [Silas] for all costs advanced . . . ." Clearly, nothing in that obligation hinges on appellant first recovering a judgment from Metrocolor.

Appellant alternatively argues the fee agreement was ambiguous as to whether repayment of costs depended on recovering a judgment. Citing that purported ambiguity, he urges that we interpret the agreement against the person--Silas--responsible for the ambiguity. We decline appellant's invitation because ambiguity presumes two or more reasonable interpretations. (*Vons Companies, Inc. v. United States Fire Ins. Co.* (2000) 78 Cal.App.4th 52, 58.) Based on the language of the entire agreement, we find unreasonable appellant's interpretation that he was responsible for costs only if he recovered a judgment. (Civ. Code, § 1641 [must interpret contract as a whole].) Accordingly, there is no reasonable ambiguity to interpret in his favor.

Appellant finally contends the court erred in awarding Silas litigation costs because she had not apportioned those costs between him and his co-plaintiffs. His contention fails because he does not discuss the evidence Silas did apportion costs. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d 875, 881; *Nwosu v. Uba*, *supra*, 122 Cal.App.4th 1229, 1246.) For example, Silas testified she removed from her cost bills any amounts attributable to appellant's co-plaintiffs or that she could not identify as being his costs alone. In doing so, she sought from appellant as his share of the costs only some $231,000 of her totals costs of more than $300,000. Although appellant notes Silas's testimony in passing, he does not address its implications for his contention that she did not apportion the costs. Moreover, he does not even

acknowledge, let alone discuss, other evidence that she apportioned costs among appellant and his co-plaintiffs. For example, he does not discuss 98 pages of invoices admitted into evidence. He also ignores copies of more than $200,000 in cancelled checks from Silas's office account to various vendors, discovery referees, and experts. Given his failure to address all the evidence supporting the costs award, we pass on appellant's contention that the court erred. (*Foreman & Clark Corp. v. Fallon*, *supra*, at p. 881; *Nwosu v. Uba*, *supra*, at p. 1246.)

4. *Court Properly Awarded Prejudgment Interest*

The court awarded Silas prejudgment interest of $67,299.66 beginning from December 2001 on the costs component of its judgment for her. (Civ. Code, § 3287 [authorizes prejudgment interest for "damages certain, or capable of being made certain by calculation"].) Appellant contends the court erred. The thrust of his contention appears to be Silas was not entitled to prejudgment interest because she first demanded payment of the litigation costs when she filed her cross-complaint in May 2003. Appellant cites nothing in the record to support his contention factually. Moreover, he cites no authority that prejudgment interest accrues only when demanded through a cross-complaint. Accordingly, we deem appellant's contention abandoned. (*Landry v. Berryessa Union School Dist.*, *supra*, 39 Cal.App.4th at pp. 699-700.)

5. *Motion for New Trial Properly Denied*

Silas's cross-complaint alleged causes of action against appellant for breach of express and implied contracts. During the bench trial of her cross-complaint, Silas moved to amend her pleading to conform to proof to allege a cause of action for quantum meruit. (See *South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 Cal.App.4th 1111, 1124 [amendment to conform allowed if based upon same general set of facts as pre-amended pleading and causes no prejudice]; *Union Bank v. Wendland* (1976) 54 Cal.App.3d 393, 400-401 [same].) Appellant contends the court erred in permitting the amendment because it introduced "new and

substantially different issues into" the trial. (*Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31 [amendment abuse of discretion if it introduces new and substantially different issues].) His contention fails, however, because he does not identify, let alone discuss, what "new and substantially different issues" the amendment created. (*Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 65, fn. 5 [alleged error regarding new trial motion waived if brief does not discuss purported error].) We therefore pass on his contention without further consideration.

SILAS'S MOTION FOR SANCTIONS

As in the first appeal, Silas asks that we sanction appellant and his attorney for a frivolous appeal. And, again, as in our first opinion in this matter, we decline to do so. Our review of the record continues to leave us with the impression, as in the first appeal, that appellant's lawyer has much to learn about appellate practice, but nevertheless has not acted in bad faith.

We have already discussed as just one example of attorney James Arden's unfamiliarity with appellate procedures his violation of the one final judgment rule. Another example ought to suffice to make our point. In footnote 7 on page 22 of his opening brief, Arden contends the trial court erred by admitting Silas's trial exhibit number 5. In his brief, Arden contends the exhibit was inadmissible hearsay. At trial, however, as shown by his footnote's citation to the record, he objected to the exhibit's admission only the basis of no foundation. An experienced appellate lawyer knows a trial attorney must state an evidentiary objection at trial in order to preserve it for appeal. Arden appears unaware of that rule. For example, he does not try to explain his failure to raise a hearsay objection at trial, in attempting to make up for the trial oversight. Instead he simply appears to assume that *any* objection below was sufficient to preserve the point for appeal--not an assumption an attorney familiar with appellate work would make. However, as we find no bad faith, the motion for sanctions is denied.

DISPOSITION

The judgment is affirmed. The motion for sanctions is denied. Respondent Martina Silas is to recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, J.

We concur:

COOPER, P. J.

FLIER, J.